92-1847

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENNY PREECE
Petitioner

v.

COMMONWEALTH OF KENTUCKY
Respondent

WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I

Was the Petitioner denied due process of law under the 14th Amendment to the United States Constitution for an arbitrary misapplication of state court decisions relating to harmless error permitting a conviction to be reinstated where Petitioner's trial was fundamentally unfair and prejudiced by wrongfully admitted evidence.

ISSUE II

Whenever a substantial question arises concerning the application of the harmless error rule — that goes to the heart of the right to a fair trial — in state court proceedings, does the due process clause of the 14th Amendment to the United States Constitution require a state court to articulate a rationale to clearly demonstrate that the evidentiary error did not prejudice or impact the outcome of the trial.

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OPINIONS BELOW

The decision of the Supreme Court of Kentucky rendered November 19, 1992 reversing the Court of Appeals and reinstating the conviction of the Appellee, BENNY PREECE, is set forth in the Appendix at A-1.

The decision of the Court of Appeals rendered January 18, 1991 reversing the judgment of the Boyd Circuit Court and remanding with directions that the case be dismissed appears in the Appendix at A-10.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1257. The final disposition of this case below was the Supreme Court of Kentucky reversal of the Court of Appeals reinstating the conviction of Petitioner, BENNY PREECE, on November 19, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment provides in part:

> nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

BENNY PREECE was charged and convicted on the following Indictment:

> That during the year 1988 the above-named Defendants *unlawfully* committed the offense of promoting gambling in the first degree, a class D felony, by *unlawfully profiting* from gambling activity by *setting up and operating a gambling device*, specifically, running and operating a bingo game which did not conform to the requirements of charitable gaming as provided in KRS 528.010(10), against the peace and dignity of the Commonwealth of Kentucky. Vol. 1, p. 4.

Preece moved the trial court for a directed verdict at the close of the Commonwealth's case in chief arguing the sufficiency of the *competent* evidence to support a conviction.

The trial court denied the motion.

The Court of Appeals found evidence improperly admitted and reversible error and held that the trial court erred in denying a motion for a directed verdict. The case was reversed and remanded to the trial court with directions that the case be dismissed.

The Commonwealth sought discretionary review in the Supreme Court of Kentucky arguing that the Court of Appeals improperly directed the trial court to dismiss the action.

The Supreme Court reversed the Court of Appeals and reinstated the conviction of Preece.

> "Evidence presented at trial included the following: 1) almost $1.7 million was received as the result of the bingo games; 2) charitable donations of thirteen thousand two hundred seventy-seven dollars and ninety-two cents ($13,277.92); 3) capital improvements to appellee's building, initially acquired for eight thou-

sand dollars ($8,000), totalled seventy-one thousand nine hundred and fifty dollars ($71,950); and 4) cash payments were placed in envelopes for workers at the games which totaled over one hundred thirty thousand dollars ($130,000) a year and were not shown on the Post's books.

Viewing the totality of the circumstantial evidence just enumerated, in a light most favorable to the Commonwealth, it is clear that reasonable minds could have fairly found the appellee guilty beyond a reasonable doubt." Supreme Court Decision, p. 6, 7

The Supreme Court wrote:

"Furthermore, while challenged testimony *of Detective Ray and State Adjutant Doebler was improperly admitted*, circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee. *Admission of this testimony was harmless.*"

Justice Leibson in dissent wrote:

"The Majority Opinion misapplies the test for harmless error, stating:

> '[W]hile challenged testimony of Detective Ray and State Adjutant Doebler was improperly admitted, circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee. Admission of this testimony was harmless.'

The test of harmless error is not whether other "evidence produced at trial was more than sufficient to support the conviction of appellee," but whether other evidence of guilt is so substantial that we can say as a matter of law that the evidence improperly admitted could not have prejudiced the outcome of the case."

Benny Preece waived the Fifth Amendment privilege and testified before the Grand Jury.

Q.208 When did the idea of bingo as a revenue source for the club and everything, when did the idea first come up? Was it about the time the club was founded or . . . .

A. No. I had a furniture store there and I really wasn't doing no good and I was taking a lot of my time up, and me and my wife wanted to travel and stuff. That's what I worked all my life for to do, you know. And these people approached me about renting the building. J.D. Miller. About renting the building for to put a bingo in it.

Q.209 Now when — this was what, 6 or so years ago? Six, 7 years ago?

A. Yeah. they were the ones that first started it. And, so I rented them the building. And they was using my name to order paper and stuff, which I didn't know about. And I went in the hospital and my wife had a falling out with them and when I come out, I found all of this out and I kicked them out. Well, then I started getting bills from these paper companies through the Amvets where they hadn't paid the bills and they had me in debt like $13,000.00. They had Amvets in debt like 13,000 and some dollars. And then this fellow that was with them, Gene Marshall, he's the one that went out there and run —

Q.210 Little Cherokee?

A. — Little Cherokee. Well, he said he'd rent it and pay the bills off. That sounds good to me, you know, I didn't know nothing about the bingo to start with.

Q.211 But you wanted that 13,000 off your back?

A. Yeah. Of course, yeah . . . And, of course, I didn't have to pay it because it was fraud, you know, but it made it look bad on me. I've been in business all my life. My dad has, too, and we've got a name that

we're not that way, you know. And, so I let these people have it and they run it, oh, I'd say a year or so and they started doing some things that I didn't like. They had house players and things people was telling me.

Q.212 House players. What's that?
A. People like buddies that come in and given them a free pack and let them play, and if they won, they'd give them half or something.

Q.213 Sort of like a kick-back type thing, yeah.
A. And I found out about it and I ran him off. And it still put me in debt, you know. So several people that I know there in town, old people and things, they didn't have nothing to do and they all bugged me. So, I run it. And it's doing fine. We've paid outself (sic) out of debt and they've got the building in pretty good shape. I'd say in another year or two they'll have the building in A-1 shape. And I leased the building to them because they're a good bunch of people in there now. In about two or two and a half more years from now the building will be the Amvets.

Q.214 You're going — we have a copy of your contract there. The deal is that after 10 years that if they're debt free, and they prove theirself to be —
A. Honorable club.

Q.215 — a honorable club, that — if all that is true, then you will deed the building over to them?
A. Yeah. My daddy started the Amvets in 1978 and I went through a great lot of trouble to get his old charter back and we're plan — we've got his charter, you know. And it's just something that's a namesake that I wanted to keep in town. I don't want nothing out of it. I don't need nothing out of it. I'm just doing it for the people in the town.

Q.216 Your father is deceased, isn't he?
A. Yeah.

Q.217 How much money do you think has been spent on the building?
A. A whole lot.

Q.218 Would you have any estimation?
A. Uh . . . I'd say probably 50-60,000 a year. Now, I'm not for sure. I'm just guessing at that. It's over the last 4 years or something like that.

Q.219 Maybe a couple hundred thousand dollars?
A. I'd say at least that, you know."
(Tr. Grand Jury, pp. 32-35)

Q.148 Do most of the guys — did you have a disability retirement or something?
A. No. I worked three jobs most of my life, and I saved my money, and I'm a wealthy person and I don't have to work no more.

Q.149 What do you — what would you estimate your personal worth to be, Benny? Not to the penny, obviously. I know you're — we're always estimating things in some round numbers. Just a ball park guess.
A. Well over a million.

Q.150 Do you think, uh . . . was some of this personal wealth gathered through inheritance?
A. No.

Q.151 All of it yourself? Didn't inherit any money?
A. Not a penny.

Q.152 Do you have any, and you may not know, do you have any estimation or guess as to what Gary's net worth might be? How much money he's got?
A. Gary?

Q.153 yes.
A. I'm not much to know people's business but I'd say he's well off. He's got a daddy that's real well off. And he's no need for money.

Q.154 Um-hum. So you don't know — you know that he's comfortable then?
A. Right.

Q.155 Certainly not poor or anything?
A. Right.

Q. 156 Have you got any children, Benny?
A. No. And ain't had no children and me and my wife both worked for 20 some years, you know."
(Tr. Grand Jury, pp. 22-24)

A. I'd say yeah. I buy property all the time and I have for several years, too. And I remodel it, and rent it, and stuff like that. You know, I buy and sell property all the time. I'm thinking I bought that about 10 years ago."
(Tr. Grand Jury, p. 6)

At trial, Detective Ray was questioned by Preece's counsel:

Q.68 Yes, sir. Look on page 7. The third question down. It starts with "Ray Cummins did the book work." Read that question and answer to the jury.
A. "Ray Cummins does the book work?," "Yes."

Q.69 The next question.
A. "Who paid the maintenance men?"

Q.70 What's the answer?
A. "Mrs. Preece wrote the check and signed my name."

Q.71 What's the next question?
A. That next question involved the tip sellers, "the names of the tip sellers besides LaDonna Brown?"

Q.72 And what did Mr. Preece tell the grand jury?
A. he said, "I had a stroke. My memory is not good. Tina — and he didn't know the last name — Terry Thompson, Don or Donna Smith." And he said, "My wife can answer quicker."

Q.73 You knew that Mr. Preece had had a stroke at some point, didn't you.
A. No sir.

Q.74 Just from what you read here?
A. When I read the grand jury transcript? When I —

Q.75 Yeah.
A. — listened to the tape Thursday?

Q.76 Before that you didn't know that he had had a stroke?
A. I still don't know that he had a stroke.

Q.77 But he said that he had had a stroke.
A. Yes, sir, he said that.

Q.78 And he does have a speech, I don't know that you would call it impediment but a kind of funny way of talking?
A. Distinctive, year, sir."
(Tr. of Evidence, Vol. III, pp. 313, 314)

Q.81 *Detective Ray, you've been a detective a long time and I think that you're a fine detective.* I know that you are, as a matter of fact. But let me ask — I've known you for a long time, too. I'm not trying to butter you up. But, I am asking you this question because I think your opinion is important. Probably in any case. I want to ask you a very important question. In your opinion, is there any competent evidence, evidence that could be brought from this jury — before this jury from the witness box that Mr. Benny Preece was paid any money or received any money from the operation of that bingo at all? And if so, I want you to tell me who it is that we should go get and bring them here to talk to this jury?
A. *If you're asking if I known the name or the identity of anybody that can say that he received cash payment from the bingo other than I assume you mean*

other than from the rent of this building and the rent of the equipment —"

Q.82 Yes, sir.
A. *. . . any cash directly to him. I know of no one who can testify to that.*

Q.83 When's the last time that you've been in that bingo, er the Amvets hall?
A. Probably would have been just prior to Gary's trial. Gary's trial date. I could look and tell you. It would have been — if his trial was October the 13th, is that the date his trial was set — it would have been a few days before that. It would have been a few days before that Gary was set to come to trial."
(TR. of Evidence, Vol. III, p. 315)

Q.90 It's still a little bit of a dump, isn't it?
A. Well, it's improved from what it was uh . . . I think bare bones might be a way to describe it. It's not extravagant."
(Tr. of Evidence, Vol. III, p. 316)

MR. JUSTICE: Noe that the Commonwealth has rested, I intend to make a Motion for Directed Verdict of Acquittal. I would like leave of Court to go ahead . . . I make a Motion for this jury to go over and view the residence. Let me make my Motion afterward —
THE COURT: Yeah, I'll let you do that.
MR. JUSTICE: I just don't want to waive it.
MR. HAGERMAN: No objection.
(END OF BENCH CONFERENCE)
(Jury, in company of Sheriff, views Amvets Building)
(Tr. of Evidence, Vol. III, p. 322)

In response to Preece's Motion for directed verdict:

MR. HAGERMAN: May it please the Court. The Commonwealth has created a jury issue in several respects. The elements of the crime charged, and I'll

address each of them. The element of profiting in unlawful gambling activity has been shown in two ways. By direct evidence and by circumstantial evidence. The direct evidence we're talking about is direct evidence that Mr. Preece had sums of money, large sums of money that were the proceeds of the bingo game used to improve property owned by him. Personal —s actually real estate but it was owned by him. That was direct evidence that came from the defendant's own mouth, via his grand jury testimony which was given to the jury by Detective Ray. *There's circumstantial proof of it that came from Mr. Doebler where he indicated that he went over there to Mr. Preece's house, saw construction going on at the club, saw and Amvets check made out for several hundred dollars for construction in Mr. Preece's kitchen, and when he was looking at it, Mr. Preece's wife came over and turned it over face down so he couldn't see it. Obviously a jury could, it's a jury question, they could infer from that that funds were being diverted from the club to direct improvements on Mr. Preece's residence.* But we really don't even have to rely on the circumstantial proof. There's direct evidence from Mr. Preece's own grand jury testimony that over $200,000.00 was expended on the building that he own and that it came from the bingo money. There's his profiting."

(Tr. Evidence, Vol. III, pp. 326, 327)

In closing argument, Preece's counsel:

MR. JUSTICE: . . . It was hashed out by the committee over at the Amvets and that they were satisfied that they were getting this building in 10 years. They're still satisfied that it's going to be their building in 10 years. Gary said it is our building, the same as, it's going to be ours in 10 years. If 87 goes out of business, the State or the National is going to get it.

They consider this a binding contract. Now, why is that important. That's important because when this money was put in — all of this money that was put into that building over there at the Amvets, actually there's two buildings now, because two buildings were bought, why would they do it? Because it was going to be their building. Seventy-one thousand dollars is not going to buy a large building. A pretty good downpayment on a large building, if you can get the credit. But, you heard Mr. Gary Preece testify that they didn't have any credit. They started on nothing. They really wouldn't even had the post probably if it hadn't been for — well, just let me say this. They didn't feel at the time that they could have got the credit to go build a new building. It all kind of slipped up on them. Over the years, you know, money adds up and it comes up to a large sum of money, $71,000.00. But you folks went over and looked at the building and I've seen the building. I've been in it a few times and I don't think that you saw a large windfall over there. You heard the testimony that a large portion of this money was money for a new concrete floor because the fire marshall came in and they had to conform to various codes and put in concrete floors, and walls, and stairs and stuff."

(Tr. of Evidence, Vol. III, pp. 326, 327)

The Commonwealth's Attorney, in closing argument stated:

"But what we're not for and what is against the law and what we won't hold still for, is somebody using the charitable gaming statute for personal gain. Personal gain. Taking away from charity, mind you. On the backs of the poor. Profiteering on a law that was enacted and passed for the benefit of charity. Profiting on the backs of the poor."

(Tr. of Evidence, Vol. III, p. 368, 369)

"In fact, that monetary total of almost 1.7 million dollars is what was furnished to him by the Preeces. We don't know with the cash dealing and so forth, it may have been — that's what they admit to. I wanted you-all to realize from the beginning of the case, we're talking about a large substantial amount of money. That's for one year. If you don't know how these things go and have not had any experience with them, you might have this image of bingo in the back of your mind, it's just, you know, 15 or 20 people sitting in a classroom in a school building somewhere moving beans around or something and somebody fishes numbers out of a fish bowl or something, and, you know, somebody wins $25.00 or something. Friends, we're talking about millions of dollars. *One point seven million that they admitted to.* Just in one year. This is not small time — this is not bingo bingo like it's a joke, *we're talking about millions of dollars. A huge gambling organization.* It's not a small-nothing thing, harmless thing, when it doesn't meet the legal criteria.

(Tr. of Evidence, Vol. III, pp. 370, 371)

"*Huge, massive amounts of cash flowing through here.* Who had the checkbook and who had control of this cash I asked Gary Preece. Sometimes I had it and sometimes Benny had it.

Joe Doebler came all the way up here from Louisville and told you that he went over there and in the Amvet world, that was a big bingo hall. I don't know what you-all, when you-all went down there and looked in there and didn't go up on the upper floor, I don't know what you saw when you went in there or what you thought of it, whether you thought it was a dump, or mediocre, or whatever; but, that's really not important whether you thought it was a dump or not. That's another curve ball thrown at you to get you to swing at it. That has absolutely nothing to do with it. Whether it's a dump or not, it's got

about $200,000.00 plus to the better than from what it was. Again, out of Benny Preece's own mouth, under sworn testimony before the grand jury, he said that. *Doebler goes over there. In the Amvet world, he said, that's a big bingo hall. That's a big one. He goes over to Benny's house. The conversation there with Benny is not too pleasant as he described it. Benny's wife goes to get Benny. He looks there and he notices there's a check drawn on the Amvets account. It's that check laying up there. I'm glad they produced it, because I want you to see it. That tells you that Joe Doebler wasn't hallucinating on what he saw. He saw that. Here's a check for $700.00 in Benny Preece's kitchen drawn on the Amvets banking account, made payable to Bill Cook for building supplies, or construction supplies, or whatever it says on there. He's just come from over at the building. He doesn't see any construction going on over there. But, there is construction going on on Benny's house. By, guess who? According to Gary, he'd seen Bill Cook over there doing some construction. And then I thought it interesting —*

MR. JUSTICE: Your Honor, I've got to object again.

THE COURT: Overruled.

MR. HAGERMAN: *— and I'm sure it struck you as interesting that when they come down into the room and Mr. Preece's wife see Joe Doebler from the State Amvets looking at that check, she comes over and gets it and turns if over. Covers it up. Why would somebody do something like that? Well, you know why. You people have got good sense. You cover something up because you don't want them to see it. You don't want them to see it because it shouldn't be there. It's wrong."*

(Tr. of Evidence, Vol. III, pp. 375, 376)

"Well, over a million dollars", he said to the grand jury. Said that under oath. Retired when he was 37.

And he had worked as a laborer out of the labor local and was able to retire at age 37, and is a millionaire. Folks, I'll sure agree with Mr. Justice that he shot off his big fat mouth in grand jury and shouldn't have said that. But that is only one of the many pieces of clear and convincing evidence that show what's going on here. *You got that much cash flying around, two guys in control of it, here you've got this club there that's got 25 or 26 members and these two in total control of the check book and the money*, he didn't get indicted because he went in and told the grand jury that he retired at age 37 and was worth over a million dollars."

(Tr. of Evidence, Vol. III, pp. 385)

"You know, I could go on and on but I think you-all have a good idea of what's happened here. We have had a couple of fellows that made them a nice little golden goose here and they were just sitting there collecting the golden eggs and stacking them up. Doing quite well, I might add. You know, I'm 36. *I wish I could retire next year and be a millionaire*; but I can't. I no of no other more convincing evidence than when the accused themself states to a grand jury, under oath, that they ran the game and that they did the same things that Gary did. That's uncontroverted. It's unrebutted."

(Tr. of Evidence, Vol. III, pp. 385, 386.)

"I don't want you-all leaving here knowing that this man was guilty and that he was proved guilty beyond a reasonable doubt and you just didn't vote guilty because you weren't strong enough to do it. That will be a monkey on your back. I've got monkeys on my back all the time. I learned to live with it. But this monkey is off my back now. I go on to other monkeys because my office is full of monkey cases. This one's off my back now because I know I've proved my case. I know I have. And, you know it, too. Now we're go-

ing to find out if the people of Boyd County, Kentucky, and that's who you-all represent right now; you-all are that cross-section of the community. We're going to find out now if the people of Boyd County, Kentucky, will enforce the gambling law. It's that simple. Because the evidence is overwhelming and unrebutted. Unchallenged. Red herrings that Mr. Justice has artfully tossed all about the room — and a tip of hat, Dave. You've done a journeyman's job —"

(Tr. of Evidence, Vol. III, pp. 387, 388)

"This evidence is like an avalanche laying there. *Retirement at 37. A millionaire.* I did the same thing Gary did. I run the game. *Those two had the cash and the check book and had control over.* LaDonna Brown, Benny sent me down there to get a job. It's all there. We don't know it all. The total amount of cash, you know, there's no way to know. *There's only two people that really know how much cash all together and that's Benny and Gary.*

Please, don't be weak. Follow the law. It's all there. The evidence is overwhelming. Don't let the community down. You're carrying the ball for the whole community. No, it's not the crime of the century but, it's important."

(Tr. of Evidence, Vol. III, pp. 389)

Financial records, bank statements and cancelled checks of the Amvets Post # 87, Catlettsburg, showing disbursements of $1,693,606.78 were available for scrutiny. Of this amount $71,950.20 were allegedly misapplied for leasehold improvements.

The propriety of using Amvets bingo funds for improving real estate owned by the Petitioner was the competent and valid issue before the petit jury.

ARGUMENT

ISSUE I

Was the Petitioner denied due process of law under the 14th Amendment to the United States Constitution for an arbitrary misapplication of state court decisions relating to harmless error permitting a conviction to be reinstated where Petitioner's trial was fundamentally unfair and prejudiced by wrongfully admitted evidence.

The decision of the Supreme Court of Kentucky in the case at bar fundamentally usurps the prerogative of the jury to determine Petitioner's guilt or innocence.

The Commonwealth by innuendo convicted Preece for skimming money — money that was not deposited in the bank and accounted for in the financial records of the Amvets Post 87. There is no evidence of criminal intent or evidence implying dishonesty to Preece save the testimony of Joseph Doebler, Department Adjutant for Amvets. The Supreme Court commented that this evidence was speculative and its admission was error. The Court of Appeals found this evidence irrelevant and its admission was error.

The Commonwealth proved Preece had the opportunity to skim from huge and massive amounts of money but no proof that he did so. Where was the propensity to do so?

Doebler's testimony gave the Commonwealth *the only proof* that Preece was perhaps acting with *dishonest motives* using Amvets money to remodel his personal residence.

> MR. HAGERMAN: — and I'm sure it struck you as interesting that when they come down into the room and Mr. Preece's wife see Joe Doebler from the State Amvet looking at that check, she comes over and gets it and turns it over. Covers it up. Why should somebody do someting like that? Well, you know why. You people have got good sense. You cover

> something up because you don't want them to see it. You don't want them to see it because it shouldn't be there. It's wrong."
>
> (Tr. of Evidence, Vol. III, pp. 375, 376)

The law is settled that generally a state court's misapplication of its own law does not raise a constitutional claim. *Estelle* v. *McGuire*, 112 S.Ct. 475, 116 L.Ed.2d 385, (1991); *Engle* v. *Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783, (1982); *Beck* v. *Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98, (1962).

The 14th Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *Beck* v. *Washington*, 369 U.S 541 (1962); *Grace* v. *Butterworth*, 635 F.2d 1 (1st Cir. 1980).

Errors of state law may rise for some other reason to the level of a denial of rights protected by the federal Constitution. *Smith* v. *Zimmerman*, 768 F.2d 69, 73, (3rd Cir. 1985) (citing *Barclay* v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Wainwright* v. *Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187, (1983)).

In *United States ex rel. Burnett* v. *Illinois*, 619 F.2d 668, 670 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980), the court analyzed the distinction between a "mere error of state law" and a violation of due process by a state appellate court's decisional process:

> The petitioner has the burden of alleging more than an error of judgment resulting in a denial of some state right . . .; the denial of the right must be the result of arbitrary action. Properly framed, then, the issue before us is whether the state court determination, based on the trial record, . . . was without an adequate determining principle, unreasonsed, . . . or had so little basis in law and fact as to constitute a denial of due process.

Accord Smith v. *Zimmerman*, *supra*, 768 F.2d at 74.

An arbitrary and capricious application of state court precedent violated the 14th Amendment. *Grace* v. *Butterworth, supra*, 635 F.2d 1, 11 (1st Cir. 1980); *Lewis* v. *Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606, (1990).

Questions relating to the admissibility of evidence are viewed as matters of state law and generally do not give rise to constitutional errors which are subject to redress in federal court. *Griffin* v. *Delo*, 946 F.2d 1356 (8th Cir. 1991); *Cooper* v. *Sowders*, 837 F.2d 284 (6th Cir. 1988); *Sadowski* v. *McCormick*, 785 F. Supp. 1417 (D. Mont. 1992).

Federal relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process. *Estelle* v. *McGuire, supra; Jeffries* v. *Blodgett*, 974 F.2d 1179 (9th Cir. 1992); *Escobar* v. *O'Leary*, 943 F.2d 711 (7th Cir. 1991).

An error so grossly or conspicuously prejudicial that it fatally infected the trial denies the petitioner fundamental fairness. *Griffin* v. *Delo*, 946 F.2d 1356, 1359.

> In order to find a violation of petitioner's due process rights, evidentiary errors must be "of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." . . . The district court must decide whether the evidence is "material in the sense of a crucial, critical highly significant factor." . . . . Overwhelming evidence of guilt defeats the argument that such evidence constitutes a "crucial, critical, highly significant factor," and if overwhelming evidence of guilt is shown, any constitutional error would simply be harmless. *Burden* v. *Zant*, 690 F. Supp. 1040 (M.D. Ga. 1988).

Error or combination of errors in the conduct of defendant's trial was so gross, conspicuously prejudicial, or of such magnitude as to deny him due process rendering the verdict unreliable violating fundamental fairness is the standard for affording relief under the habeas corpus remedy. *Derden* v. *McNeel*, 978 F.2d 1452 (5th Cir. 1992).

> The due process clause guarantees a criminal defendant faced with the prospect of being deprived of life, liberty, or property the right to a fair trial. A trial in which the prosecution uses irrelevant evidence to enrage the jury against the defendant may seem the quintessence of an unfair trial, but the legal concept of fairness includes consideration of result and desert as well as of procedural regularity, and therefore only if the evidence is "prejudicial," in the sense of likely to lead to a conviction of an innocent person, is the defendant entitled to a new trial. *Dudley* v. *Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988), and cases cited there. This evidence was not prejudicial in that sense, if only because the defendant mysteriously failed to object — and continues not to object — to the introduction into evidence of even more lurid and disgusting photographs; those of the corpse and the wound. The incremental effect of the photographs of the blood-bespattered floor could not have been significant. The error in their admission, although inexcusable, was harmless. *Ferrier* v. *Duckworth*, 902 F.2d 545, (7th Cir. 1990) at 548, 549.

The Court discussed the limits of the harmless error doctrine as follows:

> There are limitations to the doctrine of harmless error, or stated otherwise to the proposition *that probable guilt* is relevant in determining whether due process has been denied. A state is not allowed to dispense with the rudiments of civilized procedure on the ground — however demonstrable — that the defendant is guilty. The logic of such a doctrine would end in the lynch mob. *Walberg* v. *Israel*, 766 F.2d 1071, 1074, (7th Cir. 1985). We are far short of that here, however.

The erroneous admission of evidence at the state trial denied Petitioner due process. The evidence had a direct in-

fluence on the jury's consideration of petitioner's guilt or innocence. The Kentucky Supreme Court ruled that the evidence was harmless error, with judicial dissent, as in the case at bar. *Cooper* v. *Sowders*, 837 F.2d 284 (6th Cir. 1988).

ISSUE II

Whenever a substantial question arises concerning the application of the harmless error rule — that goes to the heart of the right to a fair trial — in state court proceedings, does the due process clause of the 14th Amendment to the United States Constitution require a state court to articulate a rationale to clearly demonstrate that the evidentiary error did not prejudice or impact the outcme of the trial.

What process is due, varies in relation to the interest at stake, of the individual and the nature of the government interest. Once an individual interest is deemed sufficiently substantial or fundamental, determining the constitutional necessity of a requested procedural protection requires that we examine the nature of the proceeding, both the risk of error if the protection is not provided and the burdens created by its imposition. Due process expressly requires fundamental fairness, considering precedents, and assessing the several interests at stake. *Lassiter* v. *Dept. of Social Services of Durham Co.*, 452 U.S. 18, 41, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

A state must give one it deprives of his freedom the opportunity to open an inquiry into intrinsic fairness of criminal process even though the process appears proper on the surface. *Carter* v. *People of State of Illinois*, 329 U.S. 173, 174, 67 S.Ct. 216, 91 L.Ed. 172, (1946).

The interpretation and application of the due process clause are intensely practical matters and the very nature of due process negates any concept of inflexible procedures

universally applicable to every imaginable situation. *Goss* v. *Lopez*, 419 U.S. 565, 577, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

Where procedural due process must be afforded because a liberty interest is within 14th Amendment protection, there must be determined what process is due in the particular context. *Smith* v. *Organization of Foster Families for Equality & Reform, et al.*, 431 U.S. 816, 847, 97 S.Ct. 2094, 53 L.Ed. 14 (1977).

Due process affords protection for the individual's day in court and the benefit of the general law — a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial so that every citizen shall hold his life, liberty, property and immunity under the protection of the general rules which govern society. *Truax* v. *Corrigan*, 257 U.S. 312, 331, 425 S.Ct. 1234, 66 L.Ed.2d 254 (1921).

The test of harmless error under state law is not whether other evidence produced at trial is sufficient to support a conviction but is whether the other evidence of guilt is so substantial that as a matter of law that submission of the improper evidence could not prejudice the case outcome. (Justice Liebson, in dissent in the case at bar; *Crane* v. *Comm.*, Ky., 726 S.W.2d 302, (1987); *Hill* v. *Comm.*, Ky.App., 779 S.W.2d 230 (1989).

The judicial standard for harmless error in every state is higher than the standard applied in the instant case.

The standard applied by the Supreme Court of Kentucky in the present case is patently in error.

The Court wrote:

> ". . . circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee. Admission of this testimony was harmless." (S.C. Decision, p. 7)

Under this standard, the petitioner is denied the guarantee of a fair trial by jury. Petitioner is entitled to his day in Court. The sole testimony erroneously admitted that impugns his honesty and credibility and makes him appear to be one who is profiting on the backs of the poor, deprived him of the right to have the jury, *free of prejudicial evidence*, consider the evidence offered in support of his claim to being innocent of the charges. In effect, the standard applied in this case permitted the judiciary rather than the petit jury to determine guilt.

The issue before the Court in the case at bar can be litigated further in a habeas corpus proceeding in the United States District Court.

In any case where a substantial question arises concerning whether the erroneous admission of evidence was harmless error there must be a detailed examination and analysis of the record by the state court, at the appellate level or on remand to the trial court, to demonstrate that the conclusion of law that the evidence was harmless error is well considered. Judicial economy and the fact finding process would be better served by mandating such a procedure.

The application of established and settled rules of law and modes of proceeding is the intrinsically practical nature of the due process clause. The imposition of this requirement on a state court will improve factual inquiries that are necessary for insuring fundamental fairness, the plenary right to trial by jury and the avoidance of arbitrary and capricious state action.

CONCLUSION

For all of the foregoing reasons, the Petitioner, BENNY PREECE, request this Court to grant his Petition for Writ of Certiorari.

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APPENDIX

RENDERED: November 19, 1992
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

91-SC-348-DG

COMMONWEALTH OF KENTUCKY
APPELLANT

v.

BENNY PREECE
APPELLEE

ON REVIEW FROM THE COURT OF APPEALS
90-CA-055
BOYD CIRCUIT COURT
(89-CR-056)

OPINION OF THE COURT
BY CHIEF JUSTICE STEPHENS

REVERSING

Appellee, Benny Preece, was convicted in the Boyd Circuit Court of promoting gambling in the first degree pursuant to KRS 528.020(1). His conviction was due to his involvement in the establishment and operation of bingo games for profit at Amvet Post #87, in Catlettsburg. The jury recommended that appellee receive a sentence of two years imprisonment. The trial court accepted the recommendation.

The Court of Appeals reversed the trial court and held that appellee's conviction was solely based on improperly admitted evidence. Because the only evidence demonstrating that appellee profited from the bingo games should have been excluded, the Court of Appeals found that the trial court erred in denying a motion for a directed verdict. The case was reversed and remanded to the trial court with directions that the case be dismissed. The Commonwealth sought discretionary review, which we granted.

We reverse the Court of Appeals and reinstate appellee's conviction. While admission of the challenged evidence was in error, dismissal of the case is not required in this instance. Sufficient circumstantial evidence was presented at trial with which the jury could reasonably have convicted the appellee.

Appellee owned a building that he leased to Amvet Post #87 where bingo games were allegedly operated for profit. Under KRS 528.010(10)(a), "charitable gaming" is defined as "games of chance, including bingo the net earnings of which are devoted exclusively to religious, scientific, literary, educational, or fraternal purposes."

Testimony at trial revealed that appellee was the financial secretary of Amvet Post #87. Appellee's cousin, Gary Preece was the organization's commander. Appellee was charged and convicted for promoting gambling in the first degree under KRS 528.020(1).

KRS 528.020(1) provides in pertinent part as follows:

> A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity . . .

"Profiting from gambling activity" and "advancing gambling activity" are defined in KRS 528.010(1) and (8) as follows:

> (1) "Advancing gambling activity" — A person "advances gambling activity" when, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. The conduct shall in-

clude, but is not limited to, conduct directed toward the establishment of the particular game, contest, scheme, device, or activity involved; toward the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus therefor; toward the solicitation or inducement of persons to participate therein; toward the actual conduct of the playing phases thereof; toward the arrangement of any of its financial or recording phases or toward any other phase of its operation. A person who gambles at a social game of chance on equal terms with other participants does not otherwise advance gambling activity by performing acts, without remuneration or fee, directed toward the arrangement or facilitation of the game as inviting persons to play, permitting the use of premises therefor and supplying equipment used therein.

(8) "Profiting from gambling activity" — A person "profits from gambling activity" when, other than as a player, he accepts or receives or agrees to accept or receive money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

To prove appellee's "profit motive" the Commonwealth placed into evidence testimony of an officer of the American Veterans organization, Joseph Doebler. The Commonwealth contends that the Court of Appeals erred when it found this testimony inadmissible. Doebler, a State Adjutant of the Kentucky Chapter of the Amvets, stated at trial that during a visit to appellee's home in April or May of 1989 he saw a seven hundred dollar ($700) check on the kitchen table. The check was drawn on the account of Amvet Post #87 and was designated "for construction." Though Doebler could testify about the payor and purpose of the check in question, he could not remember the check's payee, date, or other details.

Doebler testified that he observed ongoing construction outside appellee's house. Doebler also testified that he only saw the exterior of the Amvet building during his visit to Catlettsburg, and could not testify as to whether construction was, or was not, occurring inside.

The Court of Appeals reasoned that an Amvet check located on appellee's kitchen table and ongoing construction at appellee's house did not provide enough of a logical connection to make Doebler's testimony about the check relevant. We agree. The Court of Appeals properly ruled that the challenged testimony was irrelevant. There is no logical connection between the existence of the check at appellee's house and whether the appellee profited from bingo games. *See Hall's Ex'r* v. *Haynes*, Ky., 247 S.W.2d 45 (1952). Doebler's testimony concerns evidence of a collageral fact which fails to afford any reasonable presumption or inference as to the principal facts or matters in dispute. Doebler's testimony was therefore inadmissible. *See Massie* v. *Salmon*, Ky., 277 S.W. 49 (1955).

The Commonwealth next asserts that the Court of Appeals erred in ruling that appellee was prejudiced when the trial court admitted Detective Ray's testimony concerning appellee's statements made before the Grand Jury.

Detective Ray asserted at the trial that the appellee testified before the Grand Jury claiming, "I'm wealthy" and, "I run [the bingo games]." Because Detective Ray was absent from the Grand Jury proceedings, his testimony was based on knowledge of appellee's statements discerned after the detective listened to tapes of the inquiry tribunal.

When the police officer used notes that he had made while listening to the tape of the Grand Jury proceedings in order to refresh his memory, defense counsel objected. The detective's notes had not been furnished to defense counsel before an objection was raised. After the objection was registered, a copy of the officer's notes was given to appellee's counsel. The objection concerning use of the notes was then waived.

The Court of Appeals held that, due to a lack of proper foundation, admitting the detectives testimony constituted prejudicial error.

Because defense counsel did not object, the issue as to whether the challenged testimony was inadmissible hearsay is unpreserved for appellate review, absent a finding that the appellee's substantial rights were affected. *See* RCr 9.22; RCr 9.24; *West* v. *Commonwealth*, Ky., 780 S.W.2d 600 (1982). Appellee's counsel was furnished a transcript of the Grand Jury proceedings, and a copy of the notes. Following production of a copy of the notes, defense counsel waived further objection by failing to voice anything else pertaining to this testimony.

Appellee suffered no manifest injustice by admission of the detective's testimony. Considering the case as a whole, we do not believe there is a substantial possibility that the result would have been any different. *Abernathy* v. *Commonwealth*, Ky. 439 S.W.2d 949 (1969). From circumstantial evidence produced at trial, the jury could reasonably have believed that appellee was guilty of the charged crime.

Any question regarding the admission of the detective's testimony was unpreserved for review. The evidence is more than sufficient to sustain the conviction without the challenged testimony. The propriety of Detective Ray's testimony and notes do not rise to the level of reversible error under RCr 10.26.

The Commonwealth's final contention is that the Court of Appeals incorrectly ruled that appellee's motion for a directed verdict should have been granted. The Commonwealth asserts that the appellate court erred when it remanded the case to the trial court with an order to dismiss the charges. We agree.

Evidence presented at trial included the following: 1) almost $1.7 million was received as the result of the bingo games; 2) charitable donations of thirteen thousand two hundred seventy-seven dollars and ninety-two cents ($13,277.92); 3) capital improvements to appellee's building, initially acquired for eight thousand dollars ($8,000), totalled seventy-one thousand nine hundred and fifty dollars ($71,950); and 4) cash payments were placed in envelopes for workers at the games which totaled over one hundred thirty thousand

dollars ($130,000) a year and were not shown on the Post's books.

Viewing the totality of the circumstantial evidence just enumerated, in a light most favorable to the Commonwealth, it is clear that reasonable minds could have fairly found the appellee guilty beyond a reasonable doubt. A directed verdict was properly denied by the trial court. *Commonwealth* v. *Benham*, Ky., 816 S.W.2d 186 (1991); *Commonwealth* v. *Sawhill*, Ky., 660 S.W.2d 3 (1983). Furthermore, while challenged testimony of Detective Ray and State Adjutant Doebler was improperly admitted, circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee. Admission of this testimony was harmless.

We reverse the opinion of the Court of Appeals and reinstate the conviction of appellee.

Combs, Lambert, Reynolds, and Spain, JJ., concur.

Leibson, J., files a separate opinion concurring in part and dissenting in part in which Wintersheimer, J., joins.

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RENDERED: November 19, 1992
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

91-SC-348-DG

COMMONWEALTH OF KENTUCKY
APPELLANT

v.

BENNY PREECE
APPELLEE

ON REVIEW FROM THE COURT OF APPEALS
90-CA-055
BOYD CIRCUIT COURT
(89-CR-056)

OPINION CONCURRING IN PART/DISSENTING IN PART BY JUSTICE LEIBSON

Respectfully, I dissent.

The Majority Opinion misapplies the test for harmless error, stating:

> "[W]hile challenged testimony of Detective Ray and State Adjutant Doebler was improperly admitted, circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee. Admission of this testimony was harmless."

The test of harmless error is not whether other "evidence produced at trial was more than sufficient to support the conviction of appellee," but whether other evidence of guilt is so substantial that we can say as a matter of law that the

evidence improperly admitted could not have prejudiced the outcome of the case.

The principal argument made by the Commonwealth in its Brief, and the reason for accepting discretionary review, was that although the Court of Appeals may have properly reversed the conviction, it improperly directed the trial court to dismiss the action. We have gone beyond that argument to hold not only that the Court of Appeals should be reversed, but to "reinstate the conviction of appellee." The Commonwealth cites *Commonwealth* v. *Mattingly*, Ky., 722 S.W.2d 288, 289 (1986), to argue that evidence "erroneously admitted does not bar a remand for retrial." We have gone beyond this to hold that evidence erroneously admitted, even though prejudicial, does not bar reinstatement of the verdict of guilt and the judgment of conviction.

The Majority Opinion holds that objection to the testimony of Detective Ray was not preserved, and is not grounds for reversal. I agree.

But the Majority Opinion also held that evidence from Joseph Doebler regarding the $700 check he saw lying on the appellee's kitchen table was *not* connected to "profits from unlawful gambling activity" (KRS 528.020(1)) except by speculation. And this constituted reversible error.

The Court of Appeals ruled that admitting such evidence was prejudicial error. We have held that it was error, but harmless. We err in so holding.

I concur in reversing so much of the Court of Appeal's Opinion as directs the trial court to dismiss the action. But, rather than reinstating the judgment of conviction, I would remand for a new trial.

Wintersheimer, J., joins.

RENDERED: JANUARY 18, 1991; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 90-CA-000055-MR

BENNY PREECE

APPELLANT

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE CHARLES S. SINNETTE, JUDGE
INDICTMENT NO. 89-CR-056

REVERSING AND REMANDING

* * *

BEFORE: DYCHE, HAYES, and STUMBO, Judges.

STUMBO, JUDGE: This appeal arises from a judgment of the Boyd Circuit Court convicting Benny Preece of promoting gambling in the first degree. We reverse and remand with directions to dismiss.

Benny Preece, appellant, was a member and an initial director of Post 87 of the American Veterans ("AMVETS"), located in Catlettsburg, Kentucky. Post 87 was incorporated on December 10, 1986. As part of its fund-raising activities, Post 87 began conducting bingo games shortly after its incorporation. On June 14, 1989, a Boyd County grand jury returned indictments against appellant and his cousin, Gary Preece, the incorporator and commander of Post 87, accusing them of promoting gambling in the first degree, in violation

of KRS 528.020(1)(c), by unlawfully operating and profiting from the bingo games. Gary Preece entered a guilty plea before trial. Benny Preece was tried by jury on December 13 and 14, 1989, and convicted of promoting gambling in the first degree and sentenced to two years' imprisonment. Preece appeals this conviction and alleges five point of error made by the trial court. We find three of appellant's issues to be of merit, as discussed below.

Appellant contents that the trial court committed error by allowing Joseph Deobler, Department Adjutant for AMVETS, to testify about a $700 AMVETS' check he observed at appellant's residence in May or June of 1989. While Doebler did testify that the check he observed was an AMVETS' check drawn for $700 with the notation "for construction", he could not remember the payee of the check, the date of the check, or any other details. The simple fact that the check was an AMVETS' check, located on Preece's kitchen table, and construction was going on at Preece's house, does not provide enough of a logical connection to make it relevant. While Doebler testified he saw no construction going on at the AMVETS' building when he visited it, he admitted he only saw the building from the outside, and had no idea if construction was going on inside the building. Therefore, the check may or may not have been payment for construction that had already occurred at the building. Further, this event occurred in 1989, and the indictment only charged appellant with profiting from the bingo game in 1988. The testimony concerning this check clearly does not fit the common scheme or plan exception to the hearsay rule and should have been excluded. Doebler simply did not have enough knowleged concerning this check to make it logically relevant. This testimony should not have been allowed.

Appellant next finds as error the court's permitting a detective, John Ray, to testify from his notes concerning statements Benny Preece had allegedly made under oath before the grand jury which returned the indictment. Ray, although he had testified at the hearing, was not present during Preece's testimony; indeed, his only knowlege of Preece's testimony

came from listening to a taped copy of it furnished by the prosecutor. Ray used notes he had made after listening to Preece's taped testimony to refresh his recollection during his own testimony. Counsel for appellant objected when the prosecutor asked Ray to testify from these notes. However, it is apparent upon review of the transcript of evidence that this objection went to the fact that appellant's counsel did not have a copy of the notes Ray was using to refresh his recollection, not that the use of these notes was hearsay. The record reflects that a copy of Ray's notes was funished to counsel for appellant, and the objection was waived.[1] Preece's objection

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[1] The relevant portion of the transcript reads as follows:

Q.27 My questions at this point wil now shift to what Mr Preece told the grand jury that indicted him in this case.
MR. JUSTICE: Objection.
THE COURT: Grounds for the objection.
MR. JUSTICE: Your Honor, he is asking a witness what his notes show and what he heard in another place — same place, another time. If he wants to question Mr. Preece on it if he takes the stand, then he can do that. But he's trying —
MR. HAGERMAN: There's the problem.
MR. JUSTICE: — to get in through another —
THE COURT: Overruled.
Q.28 Refer to your notes —
MR. JUSTICE: I'd like to see the notes, Your Honor. It's something that I've not seen.
MR. HAGERMAN: You can certainly —
MR. JUSTICE: I asked for the grand jury transcript and I got it. I got the tape, a copy —
MR. HAGERMAN: Let the record reflect that I furnished Mr. Justice a copy of this tape months ago.
MR. JUSTICE: Sure, I've got it, transcribed it and I've got it right here. I haven't seen his notes, though. I have no idea what they say.
THE COURT: Let me see your notes.
MR. HAGERMAN: I don't care if he sees his notes.
MR. JUSTICE: And that was my objection, not — (Witness's notes furnished to counsel for Defendant)
Q.29 After Mr. Justice is through looking at your notes, if you're able to look at those notes while testifying, will that refresh your

to the use of the notes was satisfied when he was provided a copy of these notes. However, without considering the queston of whether such grand jury testimony could be introduced against appellant, it is clear that the proper foundation for its introduction was not laid. Specifically, the tape itself was not placed into evidence after being properly authenticated. In the absence of the tape's admission, Detective Ray's testimony was clearly hearsay and was prejudicial to the appellant. Therefore, we find under RCr 10.26 that the admission of this testimony was prejudicial error and should not have been allowed.

Appellant finally argues that the trial court should have granted his motion for a directed verdict based upon an insufficiency of the evidence. Since the testimony concerning the check and the detective's testimony concerning appellant's grand jury statements are the only items demonstrating any profit by Appellant from the bingo operation, and both were erroneously admitted into evidence, we find that the trial court erred and the motion for a directed verdict should have been granted.

Therefore, the judgment of the Boyd Circuit Court is reversed and remanded with directions that this case be dismissed.

ALL CONCUR.

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memory of what you herd Mr. Preece say on the sworn grand jury tape?

A. Yes, sir, it will.

MR. HAGERMAN: Let the record reflect that the bailiff is making Mr. Justice a copy of Detective Ray's notes and Mr. Justice has no objection if I proceed.

MR. JUSTICE: Correct. While we're waiting, do you have any other notes that we can make copies?

THE COURT: Do you have any other, Mr. Ray:

WITNESS: I've got some here that have some dates on them to refresh my memory that refer to events.

MR. JUSTICE: Do you mind if I see those?

WITNESS: No.

(Notes furnished to counsel for Defendant)

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